Flare Building Materials LLC v Pembinaan SPK Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORGINATING SUMMONS NO WA-24NCVC-2478–08 OF 2022
ARZIAH MOHAMED JC
18 JANUARY 2024

Civil Procedure — Judgment — Foreign judgment — Whether plaintiff could not rely on Reciprocal Enforcement of Judgments Act 1958 ('REJA') to enforce judgment of United Arab Emirates ('UAE') Court in Malaysia as UAE was not a reciprocating country under REJA — Whether since plaintiff had satisfied requirements under Evidence Act 1950 to admit the UAE judgment as secondary evidence it could rely upon common law to enforce the foreign judgment — Whether plaintiff's action to enforce the UAE judgment failed as it could not show that the defendant in the foreign judgment was the same entity as the Malaysian defendant

The plaintiff, a foreign company carrying on business in Abu Dhabi in the United Arab Emirates ('UAE'), had obtained a judgment in a UAE Court against an entity named SPK Sdn Bhd–Abu Dhabi ('SPK–Abu Dhabi') for monies owed to it in respect of goods sold and delivered/services rendered. SPK–Abu Dhabi later paid part of the judgment debt, leaving a balance of AED1,890,453.49 (equivalent to RM2,294,896.06) ('the unpaid balance'). Thereafter, SPK–Abu Dhabi abandoned its business in Abu Dhabi. Based on the UAE judgment, the plaintiff filed the instant originating summons ('OS') premised upon s 8 of the Reciprocal Enforcement of Judgments Act 1958 ('the REJA') to enter judgment for, and to enforce, the unpaid balance against the defendant herein. The defendant objected to the OS on the grounds that: (a) the plaintiff; could not invoke REJA as the UAE was not a reciprocating country under REJA's First Schedule; (b) the affidavit in support of the OS was invalid as it was undated; (c) the plaintiff's contractual dealings were with SPK–Abu Dhabi and not with the defendant and therefore the action against the defendant was misconceived; (d) the plaintiff's claim was time-barred; and (e) having framed its case upon s 8 of the REJA, the plaintiff could not then rely upon common law to pursue with the OS.

Held, dismissing the OS:

(1) Despite fulfilling the requirements under common law, the plaintiff did not satisfy the court that it had a cause of action against the defendant. There was no evidence to show any relationship between the defendant and SPK–Abu Dhabi or any business relationship between the defendant

and the plaintiff. The court was unable to find that SPK–Abu Dhabi in the Abu Dhabi judgment was the defendant (see paras 59 & 61).

(2) When the plaintiff contended that part-payments were made towards settlement of the Abu Dhabi judgment, it tendered no proof to show that it was the defendant who made the part payments and not SPK–Abu Dhabi. Even if SPK–Abu Dhabi was also the defendant, the burden was on the plaintiff to prove that contention because the defendant denied that it had any relationship with the plaintiff and/or SPK Abu-Dhabi in the Abu Dhabi projects (see para 53).

(3) REJA only applied to the countries listed as reciprocating countries in the First Schedule of REJA. UAE was not included in that First Schedule. As such, the Abu Dhabi judgment could not be enforced by resorting to REJA. That was why the plaintiff used the common law to support the OS. The plaintiff had produced the Abu Dhabi judgment properly to be admitted as secondary evidence under s 65 of the Evidence Act 1950 ('the EA') and the said judgment also accorded with the requirements under ss 74, 78 and 86 of the EA. The UAE judgment was therefore admitted as evidence (see paras 35, 38 & 44).

(4) The court was satisfied with the plaintiff's explanation on why the affidavit in support of the OS (which was signed and sworn before the Counsellor/Head of Chancery/Consular Officer from the Malaysian Embassy in Abu Dhabi) was undated. Based on the email correspondence, the affidavit was signed on the morning of 8 August 2002 and would have been ready for collection within the next two days. The undated affidavit was filed on 11 August 2002. The court found the time duration was short and accepted that it was signed and deposed by the plaintiff on 8 August 2002. The mistake in not dating the affidavit could not lie on the plaintiff. Invoking O 2 r 1(3) of the Rules of Court 2012, the court admitted the affidavit as evidence and proceeded to hear the merits of the OS (see paras 11 & 24–25).

(5) Given the part-payments that were made towards settlement of the judgment debt, based on s 26(2) of the Limitation Act 1953 the contention that the plaintiff's OS was barred by limitation had no merit (see paras 45–49).

[Bahasa Malaysia summary

Plaintif merupakan sebuah syarikat asing yang menjalankan perniagaan di Abu Dhabi di Emiriah Arab Bersatu ('UAE'), telah memperoleh penghakiman di Mahkamah UAE terhadap syarikat SPK Sdn Bhd–Abu Dhabi ('SPK–Abu Dhabi') untuk wang yang terhutang untuk barangan yang dijual dan dihantar/perkhidmatan yang diberikan. SPK–Abu Dhabi kemudiannya membayar sebahagian dari wang penghakiman dan meninggalkan baki sebanyak AED1,890,453.49 (bersamaan dengan RM2,294,896.06) ('baki

belum dibayar'). Selepas itu, SPK–Abu Dhabi meninggalkan perniagaannya di Abu Dhabi. Berdasarkan penghakiman UAE, plaintif memfailkan saman pemula ini ('SP') menurut s 8 Akta Penguatkuasaan Penghakiman Bersaling 1958 ('APPB') untuk memasukkan penghakiman dan untuk menguatkuasakan, baki yang belum dibayar terhadap defendan. Defendan membantah SP tersebut atas alasan-alasan bahawa: (a) plaintif tidak boleh menggunakan APPB kerana UAE bukan negara bersaling di bawah Jadual Pertama APPB; (b) afidavit yang menyokong SP adalah tidak sah kerana ianya tidak bertarikh; (c) urusan perjanjian adalah antara plaintif dan SPK–Abu Dhabi dan bukan dengan defendan dan oleh itu tuntutan terhadap defendan adalah salah; (d) tuntutan plaintif telah dihalang oleh had masa; dan (e) memandangkan kausa tindakan berdasarkan s 8 APPB, plaintif tidak boleh bergantung kepada common law untuk SP ini.

Diputuskan, menolak SP:

(1) Walaupun keperluan common law telah dipenuhi, plaintif tidak meyakinkan mahkamah bahawa mereka mempunyai kausa tindakan terhadap defendan. Tiada bukti yang menunjukkan terdapat sebarang hubungan antara defendan dan SPK–Abu Dhabi atau sebarang hubungan perniagaan antara defendan dan plaintif. Mahkamah mendapati bahawa SPK–Abu Dhabi bukanlah defendan di dalam penghakiman Abu Dhabi (lihat perenggan 61 & 59).

(2) Ketika plaintif berhujah bahawa pembayaran sebahagian telah dibuat untuk penyelesaian penghakiman Abu Dhabi, mereka tidak mengemukakan keterangan yang menunjukkan bahawa defendan yang membuat pembayaran sebahagian itu dan bukannya SPK–Abu Dhabi. Walaupun SPK–Abu Dhabi juga adalah defendan, beban pembuktian adalah kepada plaintif untuk membuktikan hujahan tersebut kerana defendan menafikan bahawa mereka mempunyai sebarang hubungan dengan plaintif dan/atau SPK Abu-Dhabi di dalam projek Abu Dhabi (lihat perenggan 53).

(3) APPB hanya terpakai kepada negara-negara yang disenaraikan sebagai negara bersaling di dalam Jadual Pertama APPB. UAE tidak termasuk dalam Jadual Pertama itu. Oleh itu, penghakiman Abu Dhabi tidak boleh dikuatkuasakan dengan menggunakan APPB tersebut. Oleh kerana itu, plaintif menggunakan common law untuk menyokong SP. Plaintif telah mengemukakan penghakiman Abu Dhabi dengan betul untuk diterima sebagai keterangan sekunder di bawah s 65 Akta Keterangan 1950 ('AK') dan penghakiman tersebut juga memenuhi keperluan ss 74, 78 dan 86 AK. Oleh itu, penghakiman UAE diterima sebagai sebuah keterangan (lihat perenggan 35, 38 & 44).

(4) Mahkamah berpuas hati dengan penjelasan plaintif mengenai sebab afidavit sokongan SP (yang ditandatangani dan diangkat sumpah di

hadapan Kaunselor/Ketua Pegawai Peluang/Konsular dari Kedutaan Malaysia di Abu Dhabi) tidak dibuat. Berdasarkan surat-menyurat e-mel, afidavit itu ditandatangani pada pagi 8 Ogos 2002 dan siap untuk diambil dalam tempoh dua hari akan datang. Afidavit yang tidak bertarikh itu difailkan pada 11 Ogos 2002. Mahkamah mendapati tempoh masa adalah singkat dan difahami bahawa ianya telah ditandatangani dan dibuat oleh plaintif pada 8 Ogos 2002. Kesilapan kerana tidak meletakkan tarikh pada afidavit itu tidak boleh diletakkan kepada plaintif. Berdasarkan A 2 k 1(3) Kaedah-Kaedah Mahkamah 2012, mahkamah menerima afidavit itu sebagai keterangan dan meneruskan untuk mendengar merit SP (lihat perenggan 11 & 24–25).

(5) Memandangkan pembayaran sebahagian telah dibuat untuk penyelesaian hutang penghakiman, menurut s 26 (2) Akta Had 1953, hujahan bahawa SP plaintif telah dihalang oleh had masa tidak mempunyai merit (lihat perenggan 45–49).]

Cases referred to

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457, CA (refd)

Doyenvest (M) Sdn Bhd lwn Penghuni-Penghuni Yang Tidak Dikenali dan/atau Orang-Orang Yang Tidak Dikenali Yang Telah Membina Jalan Akses dan Monumen Jirat Cina Di Atas Hartanah Yang Dipegang Di HS (D) 6048 Pt 195693 Mukim Pedah, Daerah Jerantut, Pahang Darul Makmur dan lain-lain [2022] MLJU 1306, HC (refd)

Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2023] 3 MLJ 627, FC (distd)

Licvem Shipping & Trading Aps & Anor v JLM Logistics (M) Sdn Bhd & Ors [2016] 10 MLJ 247, HC (refd)

PT Sandipala Arthaputra v Muehlbauer Technologies Sdn Bhd [2021] MLJU 1063, HC (refd)

Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LLC & Anor and another appeal [2023] 2 MLJ 324, FC (folld)

Legislation referred to

Evidence Act 1950 ss 58, 62, 65, 74, 78, 78(1)(f), 86
Limitation Act 1953 ss 6(1), 26(2)
Reciprocal Enforcement of Judgments Act 1958 ss 4(1), 8
Rules of Court 2012 O 2 r 1(3), O 7 r 3(1), O 18 r 19(1), O 28, O 41 r 9(2), O 59 r 7(2), O 67

Ain Nurawanis Ahmad Jais (Chiong & Partners) for the plaintiff.
Nicholas Poon Qianfan (Kit & Assoc) for the defendant.

Arziah Mohamed JC:

INTRODUCTION

[1] The plaintiff is a foreign company having its business in Abu Dhabi in the United Arab Emirates ('UAE'). As a specialist contractor of building materials, the plaintiff supplied materials to the company Pembinaan SPK Sdn Bhd–Abu Dhabi ('SPK–Abu Dhabi'). The company SPK–Abu Dhabi awarded five letters of awards to the plaintiff for the supply of building materials in project development areas namely Al Reem Island, Al Raha Garden and Village 4 of Al Falah Community all of which are situated in Abu Dhabi. The works were completed by the plaintiff but progressive payments were inconsistent from SPK–Abu Dhabi. To secure the amount owing, the plaintiff and SPK–Abu Dhabi signed a settlement statement of account for the balance outstanding of AED7,600,000.

[2] When SPK–Abu Dhabi failed to honour the settlement, the plaintiff took to the courts in Abu Dhabi where a final judgment was obtained for the sum of AED7,719,567 and interest at 4%pa calculated on the judgment sum from 22 January 2014 until full realization ('the judgment'). The judgment was dated 22 June 2014. Again, SPK– Abu Dhabi did not pay towards the judgment. Hence, the plaintiff took execution proceedings at the Abu Dhabi Execution Department vide Execution No 1982-2014-T Commercial-MR-T-AD ('execution bond').

[3] The plaintiff managed to recover a sum of AED6,890,452 from SPK–Abu Dhabi leaving an outstanding balance of the judgment sum of AED1,890,453.49. By this time, the plaintiff found out that SPK–Abu Dhabi had left Abu Dhabi and abandoned its business there. Due to this, the plaintiff proceeded to make the claim against the defendant on the same of cause of action as in the judgment in the Malaysian jurisdiction.

[4] Both the Abu Dhabi judgment and the execution bond are collectively referred to as the 'Abu Dhabi judgment'.

THE ORIGINATING SUMMONS

[5] The plaintiff filed the originating summons on 29 July 2022 ('OS') (encl 1) with the supporting affidavit which was undated but filed on 11 August 2022 (encl 3). The plaintiff moved this court on s 8 of the Reciprocal Enforcement of Judgments Act 1958 ('the REJA 1958'), O 67 and O 28 of the Rules of Court 2012 ('the ROC'). In essence, the plaintiff asks for an order that judgment to be entered against the defendant based on the Abu Dhabi judgment on 22 June 2014 as follows:

(a) the judgment sum of AED7,719,567 equivalent to RM9,375,659.49 (based on exchange rate 1.21 on 29 July 2022);

(b) defendant is required to pay the balance judgment sum of AED1,890,453.49 equivalent to RM2,294,896.06 (based on exchange rate 1.21 on 29 July 2022);

(c) interest at 4%pa on the balance judgment sum of AED1,890,453.49 equivalent to RM2,294,896.06 (based on exchange rate 1.21 on 29 July 2022); and

(d) costs.

[6] As the plaintiff was unable to obtain the balance of the judgment sum in the UAE, the plaintiff intends to enforce the Abu Dhabi judgment in Malaysia by way of common law.

[7] The use of common law was not in the intitulement of the OS but stated in the body of the plaintiff's supporting affidavit (para 23 therein).

[8] Both parties exchanged affidavits namely the defendant's reply affidavit dated 8 March 2023 (encl 22), plaintiff's reply affidavit dated 28 March 2023 (encl 27) and defendant's reply II affidavit dated 19 April 2023 (encl 29).

[9] In support to the OS, the plaintiff contends that the Abu Dhabi judgment is capable of registration pursuant to REJA 1958. It can be executed here in accordance with the procedure of the common law.

[10] The defendant vehemently objected to the OS. The grounds being:

(a) the OS is defective under O 7 r 3(1) of the ROC 2012 as the plaintiff cannot apply REJA 1958 because the UAE is not a reciprocating country in the First Schedule. Hence, s 8 of the REJA 1958 is inapplicable. Also, O 67 of the ROC 2012 has no application to the OS;

(b) the OS is not supported by any affidavit. The undated plaintiff's supporting affidavit does not have the endorsement on the date it was affirmed. This runs contrary to O 41 r 9(2) of the ROC 2012;

(c) the plaintiff has no case against the defendant. This is because the defendant has no knowledge of any of its business activities in Abu Dhabi. The Abu Dhabi judgment is not against the defendant but a different entity. The commercial licence was issued to SPK–Abu Dhabi and not the defendant;

(d) the Abu Dhabi judgment was not against the defendant, but SPK–Abu Dhabi. There was no privity between the plaintiff and the defendant; and

(e) the plaintiff's claim is time-barred. The Abu Dhabi judgment was dated 22 June 2014. Based on s 6(1) of the Limitation Act 1953 ('the LA 1953'), the limitation period is six years.

[11] The plaintiff argued that limitation does not set in under the LA 1953 because the defendant made payments in 2021 of AED1,890,453.49. As for the undated plaintiff's supporting affidavit, the plaintiff argued that based on exh KS1 in the plaintiff's reply affidavit, the emails showed the arrangements made for the affirmation of the said affidavit. The time frame being between 27 July 2022 until 10 August 2022. Although undated, the plaintiff's supporting affidavit is not defective because it was signed and sworn before the Counsellor/Head of Chancery/Consular Officer from the Embassy of Malaysia in Abu Dhabi.

[12] The defendant upon receiving the OS applied to this court to strike out the OS under O 18 r 19(1) of the ROC 2012 on the grounds of a defective OS that had wrong intitulement, no supporting affidavit since the affidavit filed was undated and the OS is barred by limitation under REJA. The striking out application was dismissed on 8 February 2023.

[13] Unfettered, the defendant filed another application to convert the OS to a writ (encl 23) on the grounds that there exist issues to be ventilated properly through testimonies and not by affidavits. This application was also dismissed on 29 August 2023.

[14] The defendant's contention in opposing the OS is that the OS is defective as s 8 of the REJA 1958, O 67 and O 28 of the ROC 2012 do not confer any jurisdiction on this court to grant the relief prayed. The other grounds in opposition are that the OS is not supported by any affidavit because the affidavit filed was undated although signed by the deponent for the plaintiff, the Abu Dhabi judgment was obtained against SPK–Abu Dhabi and not the defendant and also that the OS is barred by limitation period as the judgment was dated 22 June 2014.

[15] Despite asking for relief under s 8 of the REJA 1958 in the OS, the plaintiff through its undated supporting affidavit and the plaintiff's reply affidavit argued on common law and not s 8 of the as basis of the application. The plaintiff has departed from its intitulement thus creating a surprise to the defendant.

[16] The plaintiff did not apply to seek leave to amend the OS to include common law as one of its avenues for relief. The plaintiff also did not ask for leave to admit the unsigned plaintiff's supporting affidavit in court. Save for the explanation in the plaintiff's reply affidavit that emails were exchanged to show the unsigned plaintiff's supporting affidavit was actually signed before the Counsellor/Head of Chancery of the Consular Office at the Embassy of Malaysia in Abu Dhabi.

[17] The court finds that the wrong laws stated caught the defendant off guard when the plaintiff departed from its intitulement to argue on common law. The mistake is embarrassing. In the case of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, the action was dismissed. The judgment of YA Gopal Sri Ram (as he then was) is echoed:

> Now I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation.

[18] While in the case of *Doyenvest (M) Sdn Bhd lwn Penghuni-Penghuni Yang Tidak Dikenali dan/atau Orang-Orang Yang Tidak Dikenali Yang Telah Membina Jalan Akses dan Monumen Jirat Cina Di Atas Hartanah Yang Dipegang Di HS (D) 6048 Pt 195693 Mukim Pedah, Daerah Jerantut, Pahang Darul Makmur dan lain-lain* [2022] MLJU 1306 the High Court did not strike out the OS therein.

[19] I am bound by the earlier decision made on 8 February 2023 where the defendant's application to strike out the OS on the same ground was dismissed.

THE UNDATED PLAINTIFF'S SUPPORTING AFFIDAVIT

[20] While the plaintiff's supporting affidavit embodied the reasons for the OS, the uncalled undated affidavit cannot be dealt with lightly. An undated affidavit is short of evidence and it leaves the plaintiff with no supporting affidavit. The plaintiff's reply affidavit at para 6.4 merely mentioned that leave can be craved from this court for the undated plaintiff's supporting affidavit to be admitted.

[21] There was no action taken to obtain such leave from court to admit the undated plaintiff's supporting affidavit as evidence.

[22] Reference to O 41 r 9(2) of the ROC 2012 provides that:

> (2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the court.

[23] In the case of *Licvem Shipping & Trading Aps & Anor v JLM Logistics (M) Sdn Bhd & Ors* [2016] 10 MLJ 247, the undated affidavit was rejected because the plaintiffs there intimated to the court that 'for reasons unknown to us' the affidavit was not dated.

[24] I find that the plaintiff's explanation justified on why the affidavit was undated. Based on the email correspondence, the undated affidavit was signed in the morning on 8 August 2002 and would be ready to be collected within the next two days. The filing of the undated affidavit was on 11 August 2002. I find the time duration was short and I accept the undated affidavit was indeed signed and deposed by the plaintiff on 8 August 2002. The mistake in not dating the plaintiff's supporting affidavit cannot lie on the plaintiff.

[25] In applying O 2 r 1(3) of the ROC 2012 on the non-compliance with the Rules of Court allows me to deal with the non-compliance as I think fit to enable this court to deal with this case justly. The undated plaintiff's supporting affidavit is admissible as evidence of the plaintiff. This court proceeds to hear the merits of the OS.

ABU DHABI JUDGMENT

[26] The plaintiff produced vide exh P2 of the plaintiff's supporting affidavit the particulars of SPK–Abu Dhabi which commercial licence bears its trade name as 'Pembinaan SPK Sdn Bhd–Abu Dhabi'. Its legal form is stated as 'Foreign Branch-Malaysia'. Exhibit P3 in the plaintiff's supporting affidavit shows that the company search on the defendant does not bear any relation of SPK–Abu Dhabi with the defendant.

[27] The Abu Dhabi judgment in exh P10 and exh P11 in the plaintiff's supporting affidavit were never produced as original before this court.

[28] Nonetheless, s 78(1)(f) of the Evidence Act 1950 ('the EA 1950') states that public documents of any other class in a foreign country — by the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly

certified by the officer having the lawful custody of the original and upon proof of the character of the documents according to the law of the foreign country.

[29] The Abu Dhabi judgment was produced as exhibit in an undated affidavit by the plaintiff is visibly a photocopy with the Arabic to English translation by the licensed legal translator by the Ministry of Justice which certified that the translation is correct and identical to the original text. The Malaysian Consular Officer of the Embassy of Malaysia certified the signature appeared on this document is that of Customer Happiness Center from Ministry of Foreign Affairs of International Cooperation–Abu Dhabi. The Embassy of Malaysia in Abu Dhabi is not responsible of the accuracy of the information contained therein.

[30] The original copy of the Abu Dhabi judgment was primary evidence to be proved under s 62 of the EA 1950. Although secondary evidence is acceptable under s 65 of the EA 1950, it must accord with the requirements of ss 74, 78 and 86 of the EA 1950.

[31] A quick look at s 74 of the EA 1950 on public documents consist of documents forming the acts or records of the acts of the sovereign authority; official bodies and tribunals; and public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; and also public records kept in Malaysia of private documents.

[32] While s 86 of the EA 1950 is on presumption as to certified copies of foreign judicial records may be presumed as genuine and accurate if the documents purports to be certified in any manner certified by any representative of the Yang di-Pertuan Agong in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

[33] I find that the requirements of ss 74, 78 and 86 of the EA 1950 are satisfied.

REJA 1958

[34] A look at s 8 REJA 1958 states:

> 8 General effect of certain judgments
>
> (1) Subject to this section, a judgment to which Part II applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognized

in any court in Malaysia as conclusive between the parties there to in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.

(2) This section shall not apply in the case of any judgment —

(a) where the judgment has been registered and the registration thereof has been set aside on some ground other than —

(i) that a sum of money was not payable under the judgment;

(ii) that the judgment had been wholly or partly satisfied; or

(iii) that at the date of the application the judgment could not be enforced by execution in the country of the original court; or

(b) where the judgment has not been registered, it is shown (whether it could have been registered or not) that if it had been registered the registration thereof would have been set aside on an application for that purpose on some ground other than one of the grounds specified in paragraph (a).

[35] REJA 1958 only applies to the countries listed as the reciprocating countries which the UAE is not. The First Schedule in REJA 1958 does not include UAE. As such, the Abu Dhabi judgment cannot be enforced. The applicability of s 8 of the REJA 1958 is none as the UAE is not a reciprocating country. This is the reason why the plaintiff used the common law to support the OS.

COMMON LAW

[36] In arguing on the enforcement of the Abu Dhabi judgment by using the common law, the plaintiff relies on the case of *PT Sandipala Arthaputra v Muehlbauer Technologies Sdn Bhd* [2021] MLJU 1063. The salient points in the said case are the following:

[10] For the Malaysian court to recognise a foreign judgment under the common law rule, the foreign judgment which the plaintiff's action is mounted on must be for a definite sum and is final and conclusive (see *PT Adhiyasa Saranamas v Kumpulan Guthrie Bhd & Ors* [2014] 1 MLJevi 91, p 95 (HC); *The University of British Columbia v Lim Siew Eng* [2020] 1 LNS 710 (HC)). Upon satisfying these preconditions, the local court would enter judgment recognizing the foreign judgment, unless there is/are sustainable defences which have been raised opposing its recognition.

[11] Our then Supreme Court in *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107, p 109, has set out only four defences that avail to a defendant opposing the recognition of a foreign judgment under the common law. The apex court held as follows:

In an action on the judgment at common law, one or more of the following defences may be raised — (1) that the foreign court had no jurisdiction; (2) that the judgment was obtained by fraud; (3) that the judgment would be contrary to

public policy, and (4) that the proceedings in which the judgment was obtained were opposed to natural justice.

[37] The case of *Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd-LLC & Anor and another appeal* [2023] 2 MLJ 324 brings light as the Federal Court dealt with the same issue of enforcement of foreign judgment under common law action. Although the defendant succeeded in their appeal because of the plaintiff's failure to fulfil ss 78 or 86 of the EA 1950 due to the original of the Abu Dhabi judgment was not tendered in evidence; nor a copy of the original certified in accordance with s 78(1)(f) of the EA 1950 tendered.

[38] Unlike here the plaintiff had produced the Abu Dhabi judgment properly to be admitted as secondary evidence under s 65 of the EA 1950 and the Abu Dhabi judgment also accord with the requirements of ss 74, 78 and 86 of the EA 1950.

[39] The said case held:

(1) Whilst REJA served to facilitate direct execution of foreign judgments, it was only in respect of those reciprocating countries listed in in the First Schedule to that Act. The right to sue in common law upon a judgment obtained in another jurisdiction nevertheless remained. At common law, a foreign judgment was treated as an implied obligation to pay a debt, that debt being the sum awarded by the foreign court. Sans REJA, that foreign judgment could not be enforced as a judgment. That foreign judgment only created a debt between the same parties and provided a cause of action upon which the debtor could be sued on our shores. It was the judgment that was obtained from our courts, and not the foreign judgment, that was enforceable as a judgment in this country.

(2) In order to be enforceable, the foreign in personam judgment must be final and conclusive between the same parties and it must have been awarded by a court of competent jurisdiction. Consequently, it was imperative that the foreign judgment was produced to prove the claim.

(3) The requirement to produce the original copy of the Abu Dhabi judgment was more acute in the present appeals as the original judgment was not in the National Language or even in the English language. Further, the translations of the judgment that were prepared by Conaire was substantially disputed at the trial. The original copy of the Abu Dhabi judgment was primary evidence which had to *be proven under* s 62 of the Evidence Act 1950 ('the EA'). Although secondary evidence of the same was acceptable under s 65, it had to accord with the provisions of ss 74, 78 and 86 of the EA.

[40] I am guided by the said case of *Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd* as it is similar to this instant case. The respondent Conaire

Engineering, a foreign-registered company, obtained a default money judgment against a joint-venture company, SPK-Bina Puri JV in the Abu Dhabi Court of First Instance in the UAE. To avoid confusion, the said judgment is referred to as the 'UAE judgment'.

[41] In the said case, the UAE judgment was applied to be enforced against Pembinaan SPK Sdn Bhd, the same defendant here. The respondent failed to enforce the UAE judgment because the original of the UAE judgment was never tendered in evidence. In fact, copy of the original certified UAE judgment under s 78(1)(f) of the EA 1950 was also not produced. Only a copy of the UAE judgment was exhibited as an attachment to the translations which were inadequate by themselves.

[42] The Federal Court further held that the admission of the translation did not *ipso facto* admit the copy of the UAE judgment that remained intrinsically inadmissible due to the failure to comply with ss 78 or 86 of the EA 1950.

[43] Unlike here, the plaintiff satisfied the requirements under s 78(1)(f) EA 1950 where the Abu Dhabi judgment was produced as evidence in exhs P10 and P11 in the plaintiff's supporting affidavit. Section 78(1)(f) of the EA 1950 lays down the conditions on proof official documents:

> (1) The following public documents may be proved as follows:
>
> (f) Public documents of any other class in a foreign country — By the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.

[44] The UAE judgment is therefore admitted as evidence.

LIMITATION PERIOD

[45] The defendant raised amongst others, the issue that the OS is barred by s 4(1) of the REJA 1958 as the OS was filed after six years has lapsed from the date the Abu Dhabi judgment was entered on 22 June 2014.

[46] The plaintiff defended by arguing that payments had been made subsequent to the Abu Dhabi judgment dated 22 June 2014. The plaintiff contended that the defendant made payments towards the judgment sum of AED6,890,452. As of 30 September 2021, the balance outstanding was AED1,890,453.49. Thus, it was the plaintiff's contention that the revised judgment sum of AED1,890,453.49 started only from 30 September 2021 and the OS is not caught by limitation period.

[47] The plaintiff is on the right footing based on s 26(2) of the Limitation Act 1953 ('the LA 1953') that states:

> 26 Fresh accrual of action on acknowledgment or part payment
>
> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:
>
> Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.

[48] The judgment in the Federal Court case of *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2023] 3 MLJ 627 is relevant:

> Such admission amounts to an acknowledgment that if the Limitation Act applies, and we will discuss this next, s 29 of the Limitation Act provides for a fresh accrual of action in which case, the claim is not time-barred.

[49] The plaintiff admitted to receiving payments from the defendant towards the judgment sum in 2021. This amounts to an admission to the judgment debt and it is a fresh accrual of action upon acknowledgment of the judgment debt in 2021. I find that the Abu Dhabi judgment is not barred by LA 1953 based on the part payments received.

SPK–ABU DHABI

[50] I now arrive at the crux of the matter on the issue of locus standi of the plaintiff against the defendant in terms of whether SPK–Abu Dhabi is in fact the defendant.

[51] The Abu Dhabi judgment was applied to be enforced against Pembinaan SPK Sdn Bhd, the defendant here. I noticed that in the defendant's application to strike out the OS, the issue of locus standi of the plaintiff was not a ground to show there is no cause of action by the plaintiff. In the defendant's reply affidavit, the defendant argued that the Abu Dhabi judgment was not against the defendant but against SPK–Abu Dhabi. There was no involvement of the defendant with the Abu Dhabi judgment and there was no privity between both parties.

[52] The plaintiff knew all along about this issue of privity but the plaintiff did not tender any evidence to prove that SPK–Abu Dhabi and the defendant are the same company.

[53] When the plaintiff contended that part payments were made by the defendant towards the judgment, no proof was tendered to ascertain it was the defendant who made the part payments, and not SPK–Abu Dhabi. Even if SPK–Abu Dhabi is defendant, the burden is on the plaintiff to prove because the defendant denies any relationship with the plaintiff and/or SPK–Abu Dhabi in the Abu Dhabi projects mentioned.

[54] It is not an agreed fact that the defendant is SPK–Abu Dhabi for the requirement of admission to be excluded from proof under s 58 of the EA 1950.

[55] Clearly, the plaintiff failed to adduce evidence to prove the defendant is indeed SPK–Abu Dhabi.

[56] While the plaintiff previously corresponded with SPK–Abu Dhabi in the Project and also in enforcing the Abu Dhabi judgment by receiving part payment towards the Abu Dhabi judgment, the plaintiff would produce evidence to show their engagement with the defendant who is SPK–Abu Dhabi.

[57] There is no excuse for the plaintiff in not being able to produce proof to show relationship because the plaintiff was the party dealing with SPK–Abu Dhabi. If indeed SPK–Abu Dhabi is the defendant, this court must be shown with such evidence. Here, there is none.

[58] At this juncture, I again refer to *Genisys Integrated Pte Ltd v UEM Genisys Sdn Bhd & Ors.* In the said case, the defendant who is the defendant there, admitted that SPK-Bina Puri JV is the defendant, Pembinaan SPK Sdn Bhd.

[59] Unlike in this case, the defendant denied having knowledge of any business activities in Abu Dhabi but most importantly, the defendant denied having any relationship with the plaintiff and SPK–Abu Dhabi. Since the plaintiff failed to show proof such relationship exists, this court is unable to find that SPK–Abu Dhabi in the Abu Dhabi judgment is the defendant.

DECISION

[60] In careful analysis of the facts, arguments and the applicable laws put forward by parties and in taking heed of the court orders that dismissed the defendant's applications to strike out the OS and to convert the OS to writ summons, I find that the plaintiff failed to show locus standi against the plaintiff.

[61] Despite fulfilling the requirements under common law, the plaintiff did not satisfy this court on whether there is any cause of action against the plaintiff. This is due to there being no iota of evidence to show any relationship between the defendant and SPK–Abu Dhabi.

[62] The plaintiff has the burden to show proof of its case on the balance of probabilities which I find the plaintiff failed to do. The OS is hereby dismissed with costs.

[63] As for costs, this court is bound by O 59 r 7(2) of the ROC 2012. I have heard submissions from parties and took consideration of the manner in which the matter arose, the time and labour expended, the location and circumstances which the business took place together with the large amount involved.

[64] Thus, I hereby award costs of RM20,000 to the defendant, subject to allocator.

OS dismissed.

Reported by Ashok Kumar